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No. 79-1965

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

The COUNTY OF LOS ANGELES, a political subdivision of the State of California, *et al.*,
Petitioners,

v.

Hon. F. RAY MARSHALL, Secretary of Labor of the United States, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF ON CERTIORARI

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TABLE OF AUTHORITIES

Cases: Page

Brown v. *EPA*,
521 F.2d 827 (CA9 1975), vacated
as moot, 431 U.S. 99 (1977) 4, 5

Carmichael v. *Southern Coal & Coke Co.*,
301 U.S. 495 (1937) 3

Friends of the Earth v. *Carey*,
552 F.2d 25 (CA2 1977) 3

Maryland v. *Wirtz*,
392 U.S. 183 (1968) 5

New York City Transit Auth. v. Beazer,
440 U.S. 568 (1979) 3

Steward Machine Co. v. *Davis*,
301 U.S. 548 (1937) 3

Statutes:

Internal Revenue Code of 1954, as amended, 26 U.S.C.
§3309 3
§3310 3

The Special Unemployment Assistance Program,
Emergency Jobs and Unemployment Assistance
Act of 1974, Pub.L.No. 93-567, §201 *et seq.*,
88 Stat. 1845, 26 U.S.C. §3304 note 4

Miscellaneous:

Municipal Finance Off. Ass'n Gov't Finance Rsch Ctr,
Elements of Financial Mgmt (No. 3): Public Employee
Retirement Systems (May 1980) 2

Staff Data and Materials on Unemployment Compensation
Amendments of 1976 (H.R. 10210), Senate Committee on
Finance, 94th Cong., 2d Sess. (Comm. print 1976) 4

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The federal and union[1] respondents raise arguments urging the Court to avoid the constitutional issue presented by the federal unemployment amendments involved in this case. In so doing, both the federal and union respondents attempt to make their jurisdictional defenses — entirely rejected by the Court of Appeals below — more palatable by arguing that the constitutional issue must be resolved in their favor. As we pointed out in our

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[1]AFL-CIO and AFSCME, joined by the Attorney General of Michigan. Thirty-one Michigan local governments are petitioners.

Memorandum for the Respondents in No. 80-72 (filed August 16, 1980), not only are the jurisdictional assertions inseparable from the constitutional issue on the merits, but the urging of the respondents to decide the jurisdictional issue constitutes their admission of the importance of the constitutional issue.

Indeed, the jurisdictional defenses of standing (asserted by the unions)[2] and alternate remedies (asserted by the federal government)[3] highlight the hostage-taking nature of the federal statutory scheme here for review. Although the sum of $385 million to $2 billion most prominently displayed in the record represents the annual payment by state and local government employers to conform to the federal scheme,[4] the respondents focus instead on the alternative to government conformance, namely, a federal tax penalty of $11.5 billion annually,[5] imposed not on nonconforming government employers, but on private employers.[6]

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[2]Brief for Non-Federal Respondents in Opposition (hereafter Union Br. Oppos.) 4-9.

[3]Brief for the Federal Respondents in Opposition (hereafter Federal Br. Oppos.) 5.

[4]This sum produces no benefit and satisfies no need, given the elaborate public-sector systems of benefits which complement, substitute for, or obviate the need for unemployment compensation. "By and large, public employees now receive benefit levels proportionately higher than those enjoyed in the private sector for a given job classification and wage level." Municipal Finance Officers Association Government Finance Research Center, Elements of Financial Management (No. 3): Public Employee Retirement Systems 3 (May 1980).

[5]This penalty sum also produces no benefit and satisfies no need, since it cannot be used in nonconforming states. See Pet. Cert. 15-16, n.31.

[6]The federal private-sector unemployment compensation requirements are not involved in this case. No state since 1935 has resisted conformance to the federal provisions respecting benefits to private-sector employees, financed by state taxes on private-sector

Respondents evidently think that by not calling the "amount" required by IRC §3309 a "tax" they can hide what it really is in fact and constitutional substance. Their jurisdictional protestations have quite the opposite effect.

1. The federal respondents insist that a state[7] must place its private employers in jeopardy in order to litigate, under IRC §3310, the constitutionality of the federal exaction from public employers' treasuries.[8]

2. The union respondents go further, insisting (Br. Opp. 8-9) that the private employers must also bear the initiative and cost of the constitutional litigation.

To summarize these jurisdictional abattis is to point out their inapplicability. But respondents, by invoking them,

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employers and secured by the threat of a federal tax penalty on private employers. Indeed, in *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937) and *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495 (1937), Alabama was quite satisfied with the federal-state private-sector program.

The federal brief in opposition argues that *Steward* is *stare decisis* (pp. 5-9) even though no hostage-taking, intergovernmental tax immunity or unequal treatment of public and private sector issues were before the *Steward* Court. This *stare decisis* argument is an admission of the weakness of their defense. The substantial constitutional difference between the public and private programs is treated in detail in our petition (pp. 9-12, 21-32).

[7]In arguing the political subdivisions lack standing to assert a federal interest adverse to the position taken by their states, the union respondents (Br.Opp. 4-8) ignore the presence of 7 states as petitioners. In any event, the unions' assertion is incorrect. *Friends of the Earth* v. *Carey*, 552 F.2d 25, 33 (CA2 1977).

[8]The federal respondents' reference to *New York City Transit Auth.* v. *Beazer* (Br.Oppos. 5) is a perversion of the usual rule, applied in *Beazer*, 440 U.S. 568, 582, n.23, that a Court will not reach a constitutional challenge to governmental action when it is able to invalidate the action on statutory grounds.

Apart from its dubious application to a jurisdictional defense, the principle has no application where the statute is asserted by the government (here, federal) in support of its action. Here, the constitutional issue must be reached and no doctrine of judicial economy prevents this Court from doing so.

express the weakness of their case on the constitutional merits. We submit that the better view on the appropriateness of the exercise of the judicial power to prevent enforcement of the hostage-taking scheme is the one expressed where the same federalism value at issue here was present. In *Brown* v. *EPA*, 521 F.2d 827, 830-31 (CA9 1975), vacated as moot, 431 U.S. 99, 103 (1977), the court of appeals declined to await enforcement against a state of a constitutionally dubious federal regulation as the occasion to review the source of federal authority over state operations. Moreover, it would never be appropriate to stay exercise of the judicial power until collection of a federal sum as a tax unless Congress intended the sum to be a tax. We have pointed out in our petition (p. 9) that the amount threatened against private employers has never been collected by the federal respondents, who hope that, under the coercion present on the record of this case, the penalty never will be collected. In sum, there is no federal interest advanced by a delay in the resolution of the constitutional issue presented for review.

3. The federal respondents, on the merits, suggest that the Special Unemployment Assistance (SUA) program, Pub.L.No. 93-567, §201 *et seq.*, 88 Stat. 1845, 26 U.S.C. §3304 note, is relevant as an example of the federal generosity that makes a federal exaction of $385 million to $2 billion annually nothing more than another condition to the universe of federal grants (See Federal Br. Oppos. 10-13).

SUA preceded the unemployment program at issue here. SUA fit the federal grant paradigm: it produced federal money in exchange for adherence to federal conditions on the use of the money. Congress was explicit in declaring that the unemployment amendments challenged here were to *replace* SUA by shifting the funding burden from the federal, to state and local governments. Senate Comm. on Finance, Staff Data and Materials on

Unemployment Compensation Amendments of 1976 (H.R. 10210), 94th Cong., 2d Sess. 21 (1976).

So, the contrast between SUA (which is constitutionally unexceptionable) and the unemployment program here for review on the constitutional merits makes apt the analysis of Judge Sneed for the Court of Appeals for the Ninth Circuit in *Brown* v. *EPA*, *supra*, 521 F.2d, at 839, that application of superior federal power (here, the taxing power over the private employer "hostages") to coerce state conformance "would reduce the states to puppets of a ventriloquist Congress."[9]

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[9]The public-sector program is one which as the court continued in *Brown*, *supra*, 521 F.2d, at 840:

> "would enable Congress to control ever increasing portions of the states' budgets. The pattern of expenditures by states would increasingly become a Congressional responsibility. The maintenance of tax revenues at the state level would be deterred by the realization of the people of each state that their control of the expenditures of such revenues increasingly was passing from their hands. . . . [T]he Republican form of government of the states would be impaired. The power of each voter of each state over state expenditures . . . would be less than his power over state taxation. Voters of other states, acting through their representatives in Congress, would dilute the strength of the voters of the states whose revenues would be spent as Congress directs. A structure in which all power on the part of states to spend was vested in Congress while the power and obligation to tax remained with the states would encourage few even casually acquainted with the writings of Montesquieu and the *Federalist Papers* to assert that the states enjoyed a Republican Form of Government. . . . The limited severance of spending and taxing which the Administrator's interpretation of the Act and the Constitution would permit, therefore, should not be viewed as unrelated to the Guarantee Clause."

See also *Maryland* v. *Wirtz*, 392 U.S. 183, 203 (1968) (Douglas, J., dissenting), overruled by *National Leagues of Cities* v. *Usery*, 426 U.S. 833 (1976).

Whether that has happened in this case is the constitutional issue presented for decision. Not only is there no jurisdictional bar to the decision by this Court of the constitutional question; the respondents' invocation of putative jurisdictional bars expresses clearly their doubt about the constitutional validity of the statute they defend.

Certiorari should be granted.

Respectfully submitted,

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72